No. 82-5576

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

JEFFREY LEE PICKETT
BY HIS NEXT FRIEND,
FRANCES ANNETTE PICKETT

AND

FRANCES ANNETTE PICKETT,

Appellants,

v.

BRAXTON BROWN,

Appellee,

AND

WILLIAM M. LEECH, JR.,

Intervenor-Appellee.

On Appeal from the
Supreme Court of Tennessee

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF THE CHILDREN'S DEFENSE FUND AND THE WOMEN'S LEGAL DEFENSE FUND (In Support of Appellants)

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IN THE
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OCTOBER TERM 1982

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FRANCES ANNETTE PICKETT
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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE ON BEHALF OF THE CHILDREN'S DEFENSE FUND AND THE WOMEN'S LEGAL DEFENSE FUND

The Children's Defense Fund and the Women's Legal Defense Fund respectfully move this Court for leave to file a brief amici

curiae, in support of appellants, in the above-captioned case.

Movants have long advocated the rights of children and of women. Experience in such work demonstrates that limitations on the right of illegitimate children to establish child support obligations, such as Tennessee's two-year statute of limitations at issue in the case at bar, have a host of grave social and economic consequences for such children and their mothers.

Movants' proposed brief amici curiae presents only three major points, all aspects of the equal protection challenge to the Tennessee statute. Movants bring to this brief both their expertise in application of the Equal Protection Clause to classifications based on illegitimacy, and their extensive

experience in the "real-life" needs and problems of unwed mothers and their children seeking child support.

Respectfully submitted,

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BRIEF AMICI CURIAE ON BEHALF OF THE CHILDREN'S DEFENSE FUND AND THE WOMEN'S LEGAL DEFENSE FUND

INTERESTS OF AMICI CURIAE

The Children's Defense Fund is a national public charity representing and providing advocacy on behalf of low-income, minority, and handicapped children. The Children's

Defense Fund works through litigation, public education, analysis of public policy and other methods to improve the care and development of children and their economic status.

The status of illegitimacy, and the legal disabilities that have surrounded that status, have had terribly injurious effects on children. Statutes such as the one at issue in this case and others cutting illegitimate children off from private or public support put such children at a tremendous economic disadvantage.[1/] The society also unjustly stigmatizes such children for the parents' actions, "contrary to the basic concept of our system that legal burdens should bear some

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1/ See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977) (state gave no right to intestate succession); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (state gave no right to welfare to some illegitimate children); Gomez v. Perez, 409 U.S. 535 (1973) (state gave no right to child support); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (state denied workmen's compensation survivors' benefits); Levy v. Louisiana, 391 U.S. 68 (1968) (state denied wrongful death benefits); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md. 1972), aff'd mem., 409 U.S. 1069 (1972) (preference to legitimate children in distribution of father's Social Security insurance).

relationship to individual responsibility or wrongdoing," thereby producing "social opprobrium . . . relating to status of birth." Jimenez v. Weinberger, 417 U.S. 628, 632 (1974). This has alienated such children, Marcus, "Equal Protection: The Custody of the Illegitimate Child," 11 Journal of Family Law 1, 17-18 (1971), and produced worse adjustment and lower test scores for illegitimate children. Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," 64 American Journal of Sociology 196 (1958). For these reasons, the Children's Defense Fund is concerned about the denial of equal rights to illegitimate children.

The Women's Legal Defense Fund (WLDF), with about 1,000 members, is a tax-exempt organization founded in 1971 to work for equal rights for women. It represents women and men challenging barriers to sexual equality, advocates on behalf of feminist legal principles,

and conducts public education programs primarily in the areas of family law, employment discrimination, and education. The issue presented in the instant case is of enormous practical and legal significance to WLDF's client population and constituency.

If present trends continue, by the year 2000, 100% of the nation's poor adults would be women, mostly the heads of single-parent families.[2/] A major contributing factor to this "feminization of poverty"[3/] is the widespread ineffectiveness of the child support enforcement system.[4/] Any unnecessary practical barrier to the establishment or enforcement of child support obligations, such as the two-year cut-off of the right to establish

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2/ National Advisory Council on Economic Opportunity, The American Promise: Equal Justice and Economic Opportunity (1981).

3/ Id.

4/ Bureau of the Census, U.S. Dept. of Commerce, Child Support and Alimony: 1978, Current Population Reports, Series P-23, No. 106 (1980); see also L. Weitzman, The Marriage Contract: Spouses, Lovers and the Law 126-34 (1981).

paternity at issue in this case, is of great concern.

Such a barrier is particularly offensive when it discriminates on the basis of status -- here, illegitimacy -- which, like sex as well as "race or national origin, [is] a characteristic determined by causes not within the control of the . . . individual."[5/] The "rubber stamp" kind of review of this illegitimacy-based classification conducted by the Tennessee Supreme Court must be of concern to all who care about the integrity of the Equal Protection clause.

Moreover, discrimination against illegitimate children also materially affects their mothers. When laws arbitrarily relieve men of the duty to support their children, women suffer clear economic disadvantage. That economic disadvantage burdens also the mother's constitutionally protected right to the companionship, care, and custody of the child.

5/ Mathews v. Lucas, 427 U.S. 495, 505 (1976).

See Weinberger v. Wiesenfeld, 420 U.S. 636, 652 (1975). Moreover, women historically have borne and currently bear a greatly disproportionate share, compared to fathers, of the stigma, impaired social position, condemnation, and punishment resulting from parenting illegitimate children.6/

SUMMARY OF ARGUMENT

I.

For the second time in two years this court must consider the constitutionality of a state discrimination against illegitimate children in the field of child support. Tennessee, as did Texas in Mills v. Habluetzel, ___ U.S. ___, 102 S.Ct. 1549 (1982), has a statute of limitations imposing a very short period during which illegitimate children are allowed to establish paternity and thereby obtain child support. In contrast, legitimate

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6/ See, e.g., Secretary of the United Nations, Report: The Status of the Unmarried Mother: Law and Practice 56 (1971); Vincent, "Teenage Unwed Mothers in American Society," XXII, No. 2 The Journal of Social Issues 22, 30-31 (April 1966); Krause, "Equal Protection for the Illegitimate," 65 Mich. L. Rev. 477 (1967).

children can commence a support action at any time. The Tennessee law violates the principle that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." Mills, 102 S.Ct. at 1551; Gomez v. Perez, 409 U.S. 535 (1973).

II.

The Tennessee Supreme Court paid only lip service to the requirement that any discrimination against illegitimate children must be substantially related to a legitimate state interest. In actuality, the Tennessee Supreme Court crafted its own test to measure the statute, misapplied even that test, and ignored the reasoning of both the opinion for the Court in Mills v. Hableutzel and the concurring opinions that were joined by five Justices. Nor did the Tennessee Supreme Court pursue the searching inquiry required by this Court's host of earlier holdings that laws that discriminate against illegitimate children must be precisely structured to advance evident and substantial state interests.

III.

Under Mills, the only state interest that can possibly justify a shorter statute of limitations for illegitimate than for legitimate children is the state interest in protecting against stale or fraudulent claims. Tennessee, however, has a two-tiered system: the normal statute of limitations is two years, but when a child is likely to become a public charge, the limitation period is eighteen years. The Tennessee legislature has therefore itself determined that claims do not become too stale or potentially fraudulent for eighteen years.

The fact that Tennessee has not accorded its purported state interest in the limitations period any weight with regard to children undercuts the asserted legitimacy of that interest with regard to other children born out of wedlock.

The stale and fraudulent claim rationale for the two-year period thus must be considered merely a pretext for invidious

discrimination against illegitimate children. This is not a legitimate, much less a substantial, state interest. The only other asserted Tennessee interest, that of saving welfare costs, is a legitimate interest but bears no rational relationship to imposing the two-year limitation period. Tennessee's two-tiered system thus irrationally discriminates both against and among illegitimate children. See Jimenez v. Weinberger, 417 U.S. 628 (1974).

IV.

Any statute that sets a shorter limitation period for illegitimate children than for legitimates must be based on a "real threat of loss or diminution of evidence or increased vulnerability to fraudulent claims" at the stage after the limitation period. Mills, 102 S.Ct. at 1554. By creating an eighteen-year exception, Tennessee not only abandoned any concern with this threat, but it has also made no showing that such a "real threat" exists after two years. The Tennessee Supreme Court

gave no consideration to the "unique" evidentiary nature of paternity proceedings, Little v. Streater, 452 U.S. 1, 6 (1981), including such factors as blood tests, a key evidentiary element that is highly reliable and unchanging over time. Other evidentiary elements of paternity proceedings are also less likely to be lost over time than evidentiary elements of other proceedings. The Tennessee Supreme Court failed to review the actual evidentiary nature of the proceedings and failed to establish the requisite threat. Tennessee's unanalyzed pretense of concern with false or stale claims thus merely masks invidious discrimination. The statute is not designed to advance permissible state interests.

ARGUMENT

I. INTRODUCTION

In Gomez v. Perez, 409 U.S. 535 (1973), this Court invalidated a Texas law that gave a right to support to legitimate children but not to illegitimate children. Applying the

Equal Protection Clause of the Fourteenth Amendment, the Court held:

> [O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. 409 U.S. at 538.

In Mills v. Habluetzel, ___ U.S. ___ , 102 S.Ct. 1549, 1552 (1982), this Court considered Texas' "less than generous" response to Gomez. Texas gave children only a "one-year window" to bring actions for paternity and thereby to establish a right to child support. 102 S.Ct. at 1552. In Mills this Court, unanimously invalidating the Texas one-year limitations period, reiterated the principle that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 102 S.Ct. at 1551, quoting Gomez, 409 U.S. at 538.

If the Texas response to Gomez was "less than generous," the Tennessee response to

Mills which is at issue in this case -- upholding a two-year period of limitations -- is worse than grudging. The Tennessee Supreme Court itself recognized that the state law was "obviously, in the wake of Mills, . . . the minimum period which could possibly be upheld." Pickett v. Brown, 638 S.W.2d 369, 379 (Tenn. 1982). It nevertheless erroneously upheld the law, using a mechanical, result-oriented analysis that paid extensive lip service to Mills but in actuality disregarded the reasoning in Mills and the long line of precedent that led up to that holding.

The Tennessee Supreme Court's decision is simply wrong under Mills. Because of the recent consideration by this Court of a practically identical statute, amici will focus on just three aspects of this case. All three aspects involve the equal protection rather than the due process challenge to the Tennessee statute. The first is a brief description of how the Tennessee Supreme Court distorted

the principles of Mills and ignored the teachings of other, related decisions from this Court. The second discusses the utter irrationality under Mills of Tennessee's two-tiered statute of limitations. The third addresses the Tennessee Supreme Court's complete failure to examine carefully the very limited extent to which proof problems exist in paternity and child support cases.

II. THE TENNESSEE SUPREME COURT DISTORTED THE APPLICABLE PRINCIPLES OF LAW.

It is well-established that a differentiation between legitimate and illegitimate children must be "substantially related to a legitimate state interest." Mills, supra, 102 S.Ct. at 1554. See also Lalli v. Lalli, 439 U.S. 259, 265 (1978). While the Tennessee Supreme Court purported to apply this test, it ignored both the way it was applied in Mills and this Court's consistent instructions that courts should undertake much more than a cursory review of a state's asserted "interests" when

scrutinizing laws that discriminate against illegitimate children.

Indeed, the Tennessee Supreme Court boiled the question down to one that significantly differed from the Mills analysis: "[t]he inquiry, then, [is] whether the state's policy . . . affords a fair and reasonable opportunity for the mother to decide in a rational way whether or not the child's best interest would be served by her bringing a paternity suit." Pickett v. Brown, 638 S.W.2d at 376. This ignores both the established principle of the child's pre-eminent right to support regardless of her or his birth status, and the Mills analysis of the circumstances that can affect the ability of the child's mother (or other representative) to pursue that right. In striking down Texas' one-year limitations period, the Mills Court recognized that circumstances change, that an unmarried mother who does not file a support action within one year of her child's birth might rationally decide to do so more than one year after the

birth.[7] The Court pointed to several considerations, including community disapproval, the status of the mother's relationship with the father, and the mother's financial constraints associated with loss of income or expenses related to the newborn, as influencing the timing of a mother's decision.[8]

Precisely the same considerations may operate more than two years after a child's birth as well. But in Tennessee the mothers

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7/ In her separate concurring opinion, Justice O'Connor recognized that "the practical obstacles to filing suit within one year of birth could as easily exist several years after the birth of the illegitimate child." Mills v. Habluetzel, 102 S.Ct. 1549, 1556 (1982) (O'Connor, J., concurring).

8/ In addition to these changeable factors, other factors that a mother would or could rationally consider and that would affect her decision when to file a paternity action include: the father's financial circumstances (the use of the mother's frequently scarce resources to retain counsel and sue a poor, young and unemployed, or unreliable man might be inappropriate for the first two years, but the man's situation could change); the danger of physical or emotional harm to the mother or child if a lawsuit is filed; the mother's own status as a minor, frequently ignorant of the law or confused or deferring to a parental decision; increased costs (e.g., day care, school, or medical care) as the child grows older; the fact that the mother has not yet exhausted all other means of support; and lack of access to counsel.

of legitimate children can react to such changing circumstances, regardless of when in a child's minority they occur; the mothers of illegitimate children cannot. In addition, mothers of legitimate children can act irrationally at first and make a "rational" decision later. Illegitimate children, however, will suffer if their mothers make a mistake. The test applied in Tennessee, therefore, does not provide equal protection; it merely provides a new formulation for punishing illegitimate children for the actions of their parents.9/ The Tennessee court merely nods in the direction of Mills, but its analysis is based on an entirely different premise.

Indeed, the Tennessee Supreme Court paid more attention to a series of pre-Mills state court decisions than it did to Mills itself. For example, it relied on Matter of Mores v.

9/ Cf. Logan v. Zimmerman Brush Co., ___ U.S. ___, 102 S.Ct. 1148 (1982) (Powell and Rehnquist, JJ., concurring) ("As petitioners possessed no power to convene hearings, it is unfair and irrational to punish them for [someone else's] failure to do so.")

Feel, 73 Misc.2d 942, 343 N.Y.S.2d 220 (Fam. Ct. N.Y. Co. 1973), implying agreement with what the Tennessee court described as Mores' "interesting interpretation of legislative purpose," to wit,

> that the legislative purpose was clearly not to assure to all illegitimates an equal chance of establishing paternity . . . . Rather, it was more likely to assure that illegitimates were supported and educated by someone (mother, father, or public welfare) . . .. Pickett v. Brown, 638 S.W.2d at 375.

This position seriously understates the strong principle of achieving the greatest possible equality for illegitimate children that this Court has articulated in fourteen years of decisions. Perhaps the Mores court could not have anticipated in 1973 the full development of this principle, but the Pickett court in 1982 was negligent in failing to grasp what is now a well-established equality principle. "[T]he sine qua non of [such] equal legal rights [is] the identification of the person against whom the rights may be asserted."

National Conference of Commissioners on Uniform State Laws, Uniform Parentage Act (1973), Prefatory Note at 5.[10/] Moreover, this principle of equality necessarily includes a right to support from both the father and mother, not merely one or the other ("someone," in the language of the Tennessee Supreme Court). The right is one of equal protection of the laws, not one of mere subsistence on an unequal basis.[11/]

10/ Section 7 of this Act provides a twenty-one year statute of limitations. The Commissioners' 1960 Uniform Act on Paternity, section 3, similarly had no statute of limitations during minority, but the father's liability for past support was limited to four years preceding the action.

11/ Similarly, the Tennessee Supreme Court relied heavily on Cessna v. Montgomery, 63 Ill.2d 71, 344 N.E.2d 447 (1976), describing it as "[a] landmark state court case." 638 S.W.2d at 374. Cessna pre-dated not only Mills, but also this Court's decision in Trimble v. Gordon, 430 U.S. 762 (1977) (reversing the Illinois Supreme Court). Cessna's analysis generally followed that which the Illinois Supreme Court had erroneously followed in Trimble. Even before Mills, then, "[t]he conclusion that the reasoning in Cessna cannot stand after the analysis in Trimble [was] manifest." Kessler & Weinstein, "An Illegitimate's Gripe: Unequal Protection Under the Illinois Paternity 'Limitations' Provision," 69 Ill. Bar Journal 738, 745 (1981). Cf. Logan v. Zimmerman Brush Co., ___ U.S. ___, 102 S.Ct. 1198 (1982), reversing 80 Ill.2d 99, 411 N.E.2d 277 (1980).

At the same time as it relied on such cases as Mores and Cessna, the Tennessee Supreme Court failed to follow the approach taken by a number of better-reasoned state court decisions that strike down limitations on establishing paternity. E.g., In the Matter of M.D.H., 437 N.E.2d 119 (Ind. Ct. App. 1982) (two-year statute; "[a]t least five of the Justices [in Mills] intimate that any period of limitation shorter than the age of majority . . . might also be found to be unconstitutional."); Oregon v. Bradley, 58 Ore. App. 663, 650 P.2d 91 (Ore. Ct. App. 1982) (six-year statute; "[t]he decision in Mills clearly establishes that short periods of limitation in filiation proceedings are unconstitutional.").[12/] Such a one-sided analysis is at best disingenuous.

12/ See also, Commonwealth v. Gruttner, 385 Mass. 474 (1982) (six-year statute violates equal protection) (dictum); West Virginia ex rel. S.M.B. v. D.A.P., 284 S.E.2d 912 (W. Va. 1981) (three-year statute violates equal protection and due process); County of Lenoir ex

(footnote cont'd)

Of equal significance is the fact that the Tennessee Supreme Court ignored entirely the separate opinions in Mills. Five justices wrote or joined in concurring opinions emphasizing that the invalidation of a one-year period by no means necessarily implied approval of longer periods, such as Texas' later-enacted four-year statute of limitations. Justice O'Connor wrote for four members of the Court:

> I fear that the [Court's] opinion may be misinterpreted as approving the four-year statute of limitation now used in Texas.
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> I.
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> [I]t is not only birth-related circumstances that compel the conclusion that the statutory distinction in this case between legitimate and

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(footnote cont'd)

rel. Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E.2d 816 (N. Car. Ct. App. 1980) (three-year statute violates equal protection and due process); Stringer v. Dudoich, 92 N.M. 98, 583 P.2d 462 (1978) (two-year statute violates equal protection).

illegitimate children is unconstitutional. To begin with, the strength of the asserted state interest is undercut by the countervailing state interest in ensuring that genuine claims for child support are satisfied.

* * *

It is also significant to the result today that a paternity suit is one of the few Texas causes of action not tolled during the minority of the plaintiff. Of all the difficult proof problems that may arise in civil actions generally, paternity, an issue unique to illegitimate children, is singled out for special treatment. [I]t is fair to question whether the burden placed on illegitimates is designed to advance permissible state interests.

102 S.Ct. at 1556-57 (O'Connor, J., concurring). Justice Powell refused to join Justice Rehnquist's opinion, also due to a concern "that the Court's opinion may be read as prejudging the constitutionality of longer periods of limitation." 102 S.Ct. at 1558 (Powell, J., concurring). Accordingly Justice Powell wrote separately and joined in Part I of Justice O'Connor's opinion. Id. at 1558.

Justice O'Connor's suggestion that "it is fair to question" the state's actual purposes emanates from this Court's extensive experience with laws discriminating against illegitimate children and perverse state rationales for such laws. In Mathews v. Lucas, 427 U.S. 495 (1976), the Court held that discrimination against illegitimate children is not subject to an equal protection "strict scrutiny" test, but also made clear that normal "rational basis" equal protection review is insufficient. Rather, the Court articulated a form of heightened scrutiny, emphasizing that the standard of review applied is "not a toothless

one." Mathews v. Lucas, 427 U.S. 495, 510 (1976).[13/]

The statute in Lucas survived such rigorous review by using "reasonable empirical judgments that [were] consistent with a design to qualify entitlement" and that accorded illegitimate children a full opportunity to present relevant evidence. 427 U.S. at 510. "[T]he statute [in Lucas did] not broadly discriminate between legitimates and illegitimates without more, but [was] carefully tuned to alternative considerations." 427 U.S. at 513. See also, Lalli v. Lalli, 439 U.S. 259, 266 (1978); Trimble v. Gordon, 430 U.S. 762, 767 (1977).

Subsequent to Lucas, the Court has continued to emphasize the applicability of a

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13/ In Lucas, the Court reaffirmed its previous statements that ". . . the legal status of illegitimacy, however defined, is like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society," and that imposing disabilities on innocent children simply because of their birth status is "illogical and unjust." 427 U.S. at 505.

heightened standard of review to classifications disfavoring illegitimate children. "In a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose." Trimble v. Gordon, 430 U.S. 762, 769 (1977). Moreover, the relationship between the statutory scheme and the asserted state interests must be "evident and substantial." Lalli v. Lalli, 439 U.S. 266, 268 (1978). (Emphasis added.)

In sum, the Court has upheld statutory classifications discriminating against illegitimate children only "[i]n cases where statutory classifications affecting illegitimates are so precisely structured as to further a sufficiently adequate state interest . . ." Parham v. Hughes, 441 U.S. 347, 352 n.5 (1979). (Emphasis added.)

The interest that Tennessee has asserted (preventing stale or fraudulent claims) is a legitimate state interest in the abstract. Nonetheless, it is not "sufficiently adequate" to justify a two-year period of limitations,

Parham v. Hughes, 441 U.S. at 352 n.5. However, that issue need not even be addressed in this case. The Tennessee statute at issue in this case is so imprecisely tailored, so heedless of alternative considerations, that it makes the relationship between the statutory scheme and the state interests wholly impenetrable and insubstantial. This is best demonstrated by the two-tiered aspect of the Tennessee system, applying an eighteen-year period of limitations to some children, which is discussed in the next section. It was only by pursuing a toothless review, by accepting the mere incantation of a state purpose, that the court below could sustain the statute.

III. TENNESSEE'S TWO-TIERED STATUTE OF LIMITATIONS DEMONSTRATES THAT ITS TWO-YEAR LIMITATION PERIOD IS NOT BASED ON A CONCERN ABOUT FALSE OR STALE CLAIMS, AND THE STATUTE THEREFORE DISCRIMINATES IRRATIONALLY BOTH AGAINST AND AMONG ILLEGITIMATE CHILDREN.

The clearest demonstration of the Tennessee Supreme Court's incorrect approach is found in the way in which that court considered the relationship between the two-year

rule and Tennessee's separate eighteen-year statute of limitations for paternity proceedings on behalf of a child likely to become a public charge. T.C.A. § 36-224(2). The Tennessee Supreme Court relied on the eighteen-year provision as supporting the rationality of the statute at issue.

Quite to the contrary, the eighteen-year rule for public charges demonstrates that the state's alleged interest in protecting against stale and fraudulent claims can only be a pretext for an underlying invidious discrimination against illegitimate children. It establishes the emptiness of Tennessee's rationale for limiting the claims of illegitimate children.[14/]

14/ It also establishes a separate, but equally unconstitutional, discrimination among illegitimate children. See Jimenez v. Weinberger, 417 U.S. 628 (1974). The problems of proof surrounding a paternity action do not necessarily mean that a "blanket and conclusive exclusion of a subclass of illegitimates is reasonably related to the prevention of spurious claims." Jimenez v. Weinberger, 417 U.S. 628, 636 (1974). See also, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). Where "the potential for spurious claims is exactly the same as to both subclasses," Jimenez, 417 U.S. at 636, there is no basis for the statutory distinction. Here, as discussed infra, that potential is the same for both subclasses.

As decided by Mills, the only conceivable justification for discrimination between legitimate and illegitimate children in child support actions is avoiding the "litigation of stale or fraudulent claims." 102 S.Ct. at 1554. Moreover, mere recitation of such a purpose is inadequate; "any" statute of limitation "must be substantially related to" such state interest. 102 S.Ct. at 1554. (Emphasis added.)

In finding that Tennessee's general two-year limitation period for paternity actions met this test, the Tennessee Supreme Court nowhere attempted to reconcile that period with the separate period, nine times as long, applicable to children likely to become public charges. We submit that either the problems of stale or fraudulent claims justify a particular time limit, or they do not. When the Tennessee legislature determined that, for illegitimate children likely to be public charges, there were no problems of staleness or potential fraud that justified a period of

limitation shorter than eighteen years, it determined the necessary outcome of this case. There is nothing in the claims of near-poor or middle class or other children that makes them more fraudulent or difficult to prove or disprove than the claims of poor children.15/

While the public charge provision mitigates the harshness of the two-year rule for some illegitimate children (albeit only at a delayed stage when they become poor), it does nothing for the majority of illegitimate children except to underline the irrationality of the denial of their rights. Is a three-year old child's claim too stale at the same

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15/ If one were to hypothesize a greater potential for fraudulent claims, it might vary according to the fathers' economic circumstances, not the children's. The one exception to such a hypothesis might be the possibility that the worse a child's (and mother's) economic situation, the more likely it would be that the mother's desperation could lead to a false claim. Tennessee's law operates inversely to this latter hypothesis, and without regard to the former hypothesis. In any event, such speculation greatly overstates the danger of false claims, as discussed in the next section, and the Tennessee legislature had no concern about false claims, as discussed in the accompanying text.

time that his fifteen-year old cousin's identical claim is not, solely because the state wants to save its own money? If anything, Tennessee's bi-level system exacerbates any hypothetical staleness problem by requiring, once the child is over the age of two, that his or her claims be deferred until he or she is poor.16/

The only possible conclusion is that staleness was not a concern in framing the statute at issue. Rather, Tennessee's law could embody only two purposes: trying to reduce welfare expenditures, and trying to limit the claims of illegitimate children. Whatever the sources of the latter purpose (an anachronistic or gender-discriminatory desire

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16/ Nor is there any basis for hypothesizing that fraudulent claims would be less likely in the public charge situation. First, the claim for the child liable to be a public charge need not be brought by the welfare authorities; "any person" can bring the suit within eighteen years. T.C.A. § 36-224(2). Second, even when public authorities bring the suit, they of necessity will normally be acting on the basis of the mother's allegation, rather than any independent investigation.

to protect men from claims by illegitimate children; a desire to punish children for the sins of the parents; or a desire to "promote" family life[17/]), both the purpose and its sources are constitutionally flawed. See Mills v. Habluetzel, 102 S.Ct. at 1555, n.8.

A state paternity limitation law must embody a legitimate purpose other than saving welfare funds. It must seek to "ensur[e] that genuine claims for child support are satisfied," a concept that embodies state interests not merely in reducing welfare rolls, but also in seeing that "justice is done." Mills v. Habluetzel, 102 S.Ct. at 1556-57. (O'Connor, J., concurring). Such a motive is wholly foreign to the Tennessee statutory scheme. Further, by requiring the deferral of the claims of children over two until they are poor, the scheme both ill serves the children

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17/ By letting men leave to women the full social and economic responsibility for illegitimate children, the state in fact undercuts rather than promotes family life.

and irrationally serves the state interest in saving welfare costs.

Thus, the Tennessee statutory scheme draws a line on the basis of a consideration (the public purse) that is wholly irrelevant to any conceivable legislative judgment that the passage of time diminishes the quality of proof of paternity. See Matter of Wales v. Gallan, 61 Misc.2d 681, 306 N.Y.S.2d 614 (Fam. Ct. Richmond Co. 1969).

IV. TENNESSEE'S TWO-YEAR STATUTE OF LIMITATIONS DISCRIMINATES AGAINST ILLEGITIMATE CHILDREN WITHOUT BEING NECESSITATED BY ANY "REAL THREAT OF LOSS OR DIMINUTION OF EVIDENCE OR INCREASED VULNERABILITY TO FRAUDULENT CLAIMS."

The decision below not only failed to recognize that the legislature had, with its 18-year "exception" to the general two-year limitations period, abandoned any concern with spurious claims. It also blew out of proportion the problem of proof of such claims, even in the abstract. We submit that state statutes and decisions that give undue deference to this problem to justify short statutes of

limitations for paternity or support claims by illegitimate children, while tolling many other limitations periods during minority, merely mask an inappropriate protection of fathers against genuine claims of paternity. As a result, such laws inappropriately continue the discrimination that historically has been directed at illegitimate children, and perpetuate an ethos that the child and mother alone share the blame and should alone suffer the results. Such laws create "an impenetrable barrier that works to shield otherwise invidious discrimination." Gomez v. Perez, 409 U.S. 535, 538 (1973); Mills v. Habluetzel, 102 S.Ct. 1549, 1551 (1982). The assumptions underlying the Tennessee Supreme Court's analysis are typical of such an approach, relying on misconceptions and archaic views of paternity proceedings.

A statute of limitations that cuts off child support for illegitimate children at an age when legitimate children receive support may be upheld, if at all, only if "suffi-

ciently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims." Mills v. Habluetzel, 102 S.Ct. 1549, 1554-55 (1982).[18] But to measure the extent of the "real threat," if any, requires a thorough scrutiny of how evidence of paternity is created and refuted.

Yet the Tennessee Supreme Court paid no attention whatsoever to the actual nature of the evidence in paternity proceedings. In other types of cases, statutes of limitations serve to protect against stale claims, the faded memories of witnesses, loss of evidence, and death or disappearance of witnesses.[19]

18/ See Oregon v. Bradley, supra, 650 P.2d at 96 (quoting Mills, supra, 102 S.Ct. at 1554, with emphasis) (initiation of paternity action six years after birth does not present "real threat of loss or diminution of evidence, or an increased vulnerabilty to fraudulent claims").

19/ The death and disappearance of witnesses would be rare in a paternity case with respect to the two crucial witnesses, the mother and putative father. The presence of the putative father contributes substantially to the reliability of the fact-finding process and serves at the outset to discourage false claims.

(footnote cont'd)

Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945). But few, if any, other types of cases contain as a key evidentiary element a simple scientific test, of very high probative value, that does not deteriorate over time. Paternity cases do involve such an element -- blood tests and increasingly, other types of scientific tests.[20/] As a result,

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(footnote cont'd)

Lalli v. Lalli, 439 U.S. 259, 271-2 (1978). If the mother has died or disappeared, the child would be liable to become a public charge and thus the Tennessee statute of limitations would be eighteen years. Indeed, in this last situation, the death or disappearance of one key witness triggers a much longer statute of limitations, further demonstrating the utter irrationality of the Tennessee law.

20/ Such tests performed by qualified experts, "[u]nlike other evidence . . ., are difficult to refute." Little v. Streater, 452 U.S. 1, 14 (1981). Despite popular misconceptions, they are extremely reliable. S. Rep. No. 1356, 93d Cong., 1st Sess. 52 (1974), reprinted in [1974] U.S. Code Cong. & Ad. News 8155-56. See also Castillo, "New Use of Blood Test is Decisive in Paternity Suits," N.Y. Times (June 2, 1981) ("HLA testing can now yield 'negative' evidence ruling out 99.9 percent of falsely accused men" and "also yield strong 'positive' evidence . . . of 'plausibility of paternity,'" usually greater than 95 percent); Terasaki, "Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing," 16 J. Family L. 543 (1978) (blood and genetic tests exclude up to 99% of possible

(footnote cont'd)

paternity proceedings are "unique." Little v. Streater, 452 U.S. 1, 6 (1981). The key evidence does not become stale or less probative over time. "The State's concern about stale and fraudulent claims is substantially alleviated by recent scientific developments in blood testing dramatically reducing the possibility that a defendant will be falsely accused of being the illegitimate child's father." Mills v. Habluetzel, 102 S.Ct. 1549, 1557 n.2 (1982) (O'Connor, J., concurring).21/

(footnote cont'd)

non-fathers); Stroud, "Paternity Testing: A Current Approach," Trial 46 (September, 1980) (routine exclusion rate of 95 to 98 per cent); Keiter, "Advances in Anthropological Paternity Testing," 21 Am. J. Phys., Anthropology 81 (1963) (99.73 - plus probability in 19 out of 20 cases); Taub, "Medical and Legal Developments in Paternity Testing," Law Medicine and Health Care 8 (October, 1981) (HLA testing casts serious doubt on need for any statute of limitations).

21/ See also Oregon v. Bradley, supra, 650 P.2d at 96 & n.9 ("Recent scientific developments in blood testing dramatically reduce the possibility that the defendant will be erroneously determined to be an illegitimate child's father"); In the Matter of M.D.H., supra, 437 N.E.2d at 129 ("recent scientific advances in blood testing and tissue analysis have simplified considerably the evidentiary problems in paternity cases");

(footnote cont'd)

Indeed, if a state were truly concerned with proof of paternity problems, it could express that concern in a variety of more carefully tuned ways than cutting off causes of action entirely after artificially short time periods. The primary expression will normally come through the burden of proof, a much more appropriate mechanism than an absolute bar. See Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 72, 76 (1968).22/

Second, Tennessee could utilize other ways of encouraging prompter claims, such as, perhaps, limiting the right to retroactive child support. The problem of "stale" causes of action relates to such back support:

(footnote cont'd)

County of Lenoir, supra, 264 S.E.2d at 821 (questioning the need for a paternity statute of limitations "in light of advances which have recently been made in blood typing").

22/ See also Krause, "Legitimate and Illegitimate Offspring of Levy v. Louisiana - First Decisions on Equal Protection and Paternity," 36 U. Chi. L. Rev. 338, 349-53 (1969).

> An action to determine paternity is not a stale claim when employed as a prerequisite to an illegitimate's obtaining of continuing, recurring support. This right has never become dormant, and for the statute of limitations to act to preclude this right on the basis that it is stale is illogical.
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> * * *
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> The only proper application of the statute of limitations to child support claims would be to those claims that have accrued in the past but which are not adjudicated. The state could properly say that a claim for child support not made within a certain time after it accrued is barred. However, since the duty of support continues throughout the minority of the child, new causes of action are being created each day that the natural father does not provide support. This duty of future support cannot be barred for illegitimate children if it is allowed for legitimate children.

State of Florida, Department of Health and Rehabilitative Services v. West, 378 So.2d 1220, 1227-28 (Fla. 1979).

Thus, while blood tests and similar evidence may not be dispositive, they make the determination in a paternity proceeding more reliable than that in most other proceedings. Any residual problems of stale evidence can be

handled through mechanisms more tailored to the problems than short statutes of limitations. Nevertheless, the Tennessee legislature responded to the problem by making the limitations period shorter than that for many other causes of action, and the Tennessee Supreme Court in turn wholly ignored the existence of blood tests and implicitly assumed a very high degree of unreliability in paternity proceedings. The gap between reality and Tennessee's responses, much like the actions of Texas considered last year, makes it "fair to question whether the burden placed on illegitimates is designed to advance permissible state interests." Mills v. Habluetzel, 102 S.Ct. 1549, 1557 (1982) (O'Connor, J., concurring). More likely, the state's design was to perpetuate the damage to those who have suffered "through the ages society's 'illogical and unjust' condemnation." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). Tennessee's statute does not meet the tests set forth by this Court in Mills.

CONCLUSION

The judgment of the Tennessee Supreme Court should be reversed.

Respectfully submitted,

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